Supreme Court of the Hawaiian Islands. In Equity. At Chambers.

Bill for Specific Performance.

JOHN P. PARKER AND SAMUEL PARKER VS. ALEXANDER J. CARTWRIGHT, TRUSTEE; ALBERT KUNUIAKEA AND THE KAHUA RANCH COMPANY.

BEFORE DOLE, J.

Decision

The bill alleges that the defendant, Cartwright, as attorney in fact of Emma Kaleleonalani, since deceased, testate, delivered on January 1st 1879, a lease signed and sealed by said defendant on the one part and Allen and Stackpole on the other part, whereby the Ahupuaa of Kawaihai, on the Island of Hawaii, was leased to said Allen and Stackpole for a term of ten years thereafter at an annual rental of $450, and taxes, excepting certain reservations therein named, with a covenant that the lessees should have the privilege of renewal of said lease, subject however, to a new agreement therefor, and that the said lease was on July 1st, 1883, with the written consent of said Cartwright, assigned by the said lessees to the plaintiffs, who still occupy the demised premises under the same; that the said Cartwright is the devisee of the said premises in trust to pay the income thereof to said defendant, Kuniakea, during his lifetime, and at his death to convey the same to his issue, if any, otherwise to the Queen's Hospital; that the said Cartwright, regardless of the plaintiffs' rights under the said covenant, has executed a lease of the said premises for a term of fifteen years from January 1st, 1889, at an annual rental of $1,500, to E. A. Burchardt, A. G. Burchardt, F. Burchardt and John McGuire, partners under the style of the Kahua Ranch Company, defendants as aforesaid, and that the said company took the said lease with actual knowledge that the plaintiffs held the said premises under the first named lease and that they were of peculiar value to the plaintiffs besides their intrinsic value, from the fact that they join other land of the plaintiffs, used by them in the ranching business, and that the plaintiffs desired and intended to renew their said lease; that the said company might have ascertained from the plaintiffs the existence of the said covenant of renewal. The bill further alleges that the said premises have a peculiar value to the plaintiffs as aforesaid; that ever since the said assignment to them of the said lease they have desired and intended and still desire that the said lease be renewed to them and that a new agreement therefor be made pursuant to the said covenant, and that they have requested the said Cartwright to execute with them such agreement, and that without intending to waive their rights thereto, they have offered to said Cartwright to take a lease of the said premises for a further term of fifteen years at an annual rental of $600.

The plaintiffs claim that under the allegations, the said company are chargeable with notice of the said covenant and of the plaintiffs' interests therein, and that they have taken their said lease subject to the plaintiffs' rights under the same, and pray that they be decreed to surrender their said lease to the said Cartwright and that he be decreed to accept the same and to execute to plaintiffs a lease of the premises according to the said covenant.

All of the defendants filed answers to the bill of complaint.

The defendant Cartwright, in his answer admits the lease to Allen and Stackpole with the exception of the alleged covenant of renewal, which he denies. He further admits the assignment of the said lease to the plaintiffs and that they are still occupying the said premises under such lease; also that he is the devisee of the said premises in trust as alleged by the bill, and that a lease was executed and delivered to the Kahua Ranch Company, defendants, as alleged by the bill, but states, in explanation thereof, that he does not know of his own knowledge whether or not said premises adjoin plaintiffs' other land, or that plaintiffs desired or intended to obtain a new lease, but that in the year 1887 he notified W. F. Allen the agent of the plaintiffs, that other persons were desirous of leasing the said premises at the expiration of the existing lease and that he would receive bids for a new lease; that thereupon the said Allen, as such agent, made an offer to lease the said premises for a term of fifteen years at an annual rental of $800, which he, the said Cartwright, refused; that thereafter he received from the said Kahua Ranch Company an offer for a term of fifteen years at an annual rental of $1,500 and taxes, which offer he accepted and executed the lease to the said company as aforesaid, and thereupon notified the said Allen thereof. The said answer further admits the plaintiffs' demand for a renewal of the existing lease under the alleged covenant for renewal, a few weeks before the beginning of these proceedings, and alleges that no such covenant is contained in the counterpart of the said first lease which is in his poessession, and that neither the said lease nor the alleged covenant of renewal are recorded in the Registry of Deeds.

The Kahua Ranch Company, defendants, in their answer admit the execution of the said lease in their favor, and that at and before the execution thereof they knew that the plaintiffs were in possession of the premises and that they were informed that plaintiffs held possession under a lease from Cartwright, defendant, acting for Emma Kaleleonalani, but did not know the terms thereof, further than that it was about to expire, but deny that they knew that the premises were of peculiar value to the plaintiffs as alleged in the bill. Their answer further states that before the execution of the said lease they did not know and had not heard of the said alleged covenant for renewal of the said lease, nor of the intention or desire of the plaintiffs to enter into an agreement for such renewal; that they were informed that the said Cartwright, defendant, desired that bids should be made by persons wishing to lease the premises from the expiration of the existing lease; that they are informed and believe that the said Allen, the agent of the plaintiffs, received similar information from the said Cartwright, and was told by him that other persons were seeking to lease the premises and that a new lease therefor would be given to the highest bidder, and that thereupon the said Allen tendered a bid therefor, as aforesaid, and that they, the said company, being ignorant of th eoffer made by the said Allen, made their bid for the said lease as aforesaid, which was accepted and a lease in conformity therewith was thereupon executed, and that the said Allen and the plaintiffs, during the pendency of the negotiations for the said lease and long after the execution thereof did not claim nor intimate that they were entitled to a renewal of the plaintiffs' said lease, nor that a covenant of renewal was contained therein; that on or about November 20, 1887, the said Allen, in conversation with the said E. A. Burchardt, epxressed much disapproval of the action of Cartwright in the matter, but did not claim nor intimate that the plaintiffs were entitled to a new lease under the covenat of renewal, and said that they would never have paid such rent as had been offered by the company, and expressed surprise that the company had been willing to offer so much; and they claim that they have acted in good faith in the matter; that the action of the plaintiffs in tendering a bid for a new lease and their conduct in the premises was inconsistent with the supposition of the existence of a covenant for renewal; that the alleged covenant is void for uncertainty; that they are not chargeable with notice thereof, and that since the execution of the said lease to them they have, relying upon the same, arranged their business with the expectation of occupying the premises in question on January 1st, 1889, and are greatly prejudiced by reason thereof.

The answer of Albert Kunuiakea, defendant, was merely formal.

The covenant, which is the basis of this controversy, is as follows:

"it is understood and agreed between the parties to the above lease that Allen and Stackpole shall have the privilege of renewal subject, however, to a new agreement.

(Sig.) ALEX. J. CARTWRIGHT,
" ALLEN & STACKPOLE."

This is written in Cartwright's handwriting immediately below the signatures of the original lease from Cartwright to Allen & Stackpole, which lease was delivered to Allen & Stackpole and went into the possession of the plaintiffs upon the assignment of the lease to them. The same lease contains the following marginal endorsements:

"Permission is hereby given to W. F. Allen and C. E. Stackpole to assign this lease to Samuel Parker and Jno. P. Parker, subject to the covenants herein.

(Sig.) KALELEONALANI,
by her atty. in fact,
ALEX. J. CARTWRIGHT.

Witness,
ALEX. J. CARTWRIGHT, JR."

And:

"The within lease is hereby assigned to John P. and Samuel Parker, July 1st, 1883.

(Sig.) ALLEN & STACKPOLE."

Considerable testimony was taken on both sides, and the defendants contended that under the pleadings and evidence;

1. The alleged covenant for renewal is void for uncertainty.

2. The plaintiffs, by making proposals for a new lease obviously outside of the said alleged covenant for renewal, without at the time claiming any benefit or preference under the same, waived whatever rights they may have had under such covenant.

3. The plaintiffs, by their silence in regard to the said alleged covenant of renewal, at the time of the said lease to the Kahua Ranch Company and afterwards, are estopped from claiming any benefit therefrom.

4. The alleged covenant for renewal, not being recorded, and the Kahua Company being ignorant of its existence, they should not be affected by it.

Upon the first point, that the alleged covenant for renewal is void for uncertainty, it is argued by counsel for defendants that the words "subject however, to a new agreement," at the end of the covenant, introduce ambiguity into the document and prevent it from being a simple and definite covenant for renewal of the lease, but make it an agreement for a new lease upon terms to be agreed upon in the future, which, as counsel say, could not be construed nor enforced.

In considering this question, very little assistance is afforded by the evidence. Mr. Cartwright cannot remember anything about the covenant or its execution, and Mr. Allen cannot remember when it was made, but testifies that it was done at his request and that he should hardly have taken the lease without it. If we leave out the words "subject however, to a new agreement," there is no question that it would be a covenant for a new lease upon the terms of the old one. (*Tracy vs. Albany Exch. Co.*, 7 N. Y. 474.) Do those words change the meaning? If they make it mean that the tenants are entitled to a new lease upon terms to be agreed upon, the contention of defendants' counsel, that it is void for uncertainty, is certainly sound. The document is capable of this meaning; is it capable of any other? I do not see how it can be construed into an agreement to give the tenants a right to make a bid for a new lease; it contains no words which import such a meaning. There is only one other possible construction open to consideration, and that is that the words mean an agreement for renewal of the existing lease, that is to say, they form an agreement for a new lease upon the expiration of the old, upon the same terms with the old. I think the words are capable of this interpretation; the words "subject however, to a new agreement," may mean either subject to terms that may be agreed upon, or subject merely to the conditions of a new lease to be executed for a similar term and similar conditions with the old one. Under a covenant for renewal a "lessor is bound to make another lease of the premises." (Taylor's Landlord and Tenant, 332, 340.) Such new lease on the same terms with the old may be meant by the words "new agreement." If the document is capable of two interpretations, I find by all the authorities that it must be construed in that sense in which it will have some effect. "When a a cause is capable of two significations, it should be understood in that which will have some operation, rather than in that in which it will have none." (*Archibald vs. Thos.*, 3 Cowen 290) And Lord Mansfield said in *Pugh vs. Duke of Leeds*, (Cowp. 725): "The ground of the opinion and judgment which I now deliver, is that 'from,' may in the vulgar use, and even in the strictest propriety of language, mean either *inclusive* or exclusive; that the parties necessarily understood and used it in that sense which made their deed effectual; that the courts of justice are to construe the words of parties so as to effectuate their deeds, and not to destroy them; more especially where the words themselves abstractedly may admit of either meaning." The parties could not have intended a sham agreement, —a document which was a coveuant only in form but void in reality. The alleged covenant of renewal was part of the inducement to Allen and Stackpole to take the lease; it was understood by Allen to be a valuable consideration. Cartwright must have intended that he should so understand it. Therefore if the document is capable of two constructions, that one must be adopted in which the promising party intended the other to understand it, if the other did so understand it, or as Chancellor Kent expressed the rule: "The true principle of sound ethics is, to give the contract the sense in which the person making the promise believed the other party to have accepted it, if he in fact did so understand and accept it." (2 Kent 557, Chitty's Contracts, 74, and Paley's Moral Philosophy.) The old rule, that in the construction of instruments in cases of ambiguity, the words must be taken most strongly against the party that used them and most favorably to the other party, may also be applicable to this case, and if so, it supports the conclusion which I have adopted, that the document in question is a covenant for the renewal of the original lease at the option of the lessees.

The second point raised by the defense, is that the plaintiffs, by making proposals for a new and dissimilar lease without claiming any preference or privilege under the renewal covenant, waived whatever rights they may have had under it.

If Allen's offer for a new lease for fifteen years at $600 a year, had been accepted, it would have been a waiver of the covenant of renewal unless it could have been avoided on the ground of mistake, but it was refused. Although it is doubtful if an agreement within the statute of frauds, as this is, may be proved to have been orally waived in an action at law, yet in equity such proof may be admitted, but such parol waiver must "be express and of such a character as to leave no reasonable doubt as to the intention of the parties." (*Rodman vs. Gilley*, 1 N. J. Eq., 320, 328.) In the case before the Court there is no evidence of any intention on the part of the plaintiffs to waive their rights except as such proposition for a fifteen year lease, might be so regarded; but both Allen and S. Parker appear to have forgotten the covenant of renewal at the time this proposition was made; and in any case it would not have the effect of a waiver unless it had been accepted and entered into. When Mr. S. Parker returned from San Francisco, in October, 1887, he first ascertained that the land had been leased to the Kahua Ranch Company, and shortly afterwards, in the month of December, he informed himself of the covenant for renewal. At that time there were negotiations going on through Mr. Allen for an exchange of these premises with another land which Parker had a prospect of obtaining. In January, 1888, Parker had an interview with F. Burchardt, at Kahua, upon the matter of the proposed exchange, at which time he told F. Burchardt that he didn't know but he had a clause of renewal and if they couldn't come to terms he might apply for a new lease. —presumably under such covenant of renewal. About February 10, 1888, S. Parker had an interview with the Burchardts upon the same subject at Kawaihae beach, and said during the conversation, if negotiations came to nothing he might try to get a renewal of the lease. These expressions of Mr. Parker are inconsistent with the theory of waiver, and they were made with reasonable promptitude after he had an opportunity to examine his lease and inform himself about the covenant for renewal.

The same circumstances are also unfavorable to the defense of estopped; there was no concealment of the facts by the plaintiffs after the return of S. Parker from San Francisco; neither was there a "standing by" and allowing the Kahua Ranch Company to spend money, or arrange their business upon the strength of their deed from Cartwright. In January and February, 1888, the negotiations for the exchange were going on and there is no pretense that at that time the Kahua Ranch Company had seriously conformed their business arrangements to the expected acquirement of the premises in question, nearly a year afterward; yet that was the time when S. Parker intimated to them that he thought he had a covenant of renewal, and that if they couldn't come to terms he might take advantage of it. This was not keeping silence nor "standing by," and whatever expenditure or arrangements the company afterwards made, they made upon their own responsibility and peril. Moreover it appears that in the month of December, 1887, F. Burchardt was informed by a man named Stupplebeen, who he was aware had been a clerk of Stackpole, that there was a renewal clause, and he says he placed no reliance upon what he said and when he seemed to be anxious about it, "I had nothing more to say to him." It is also a matter of evidence that the Kahua Ranch Company were perfectly well aware that the plaintiffs were in possession of the premises in question under a lease from Cartwright, but made no effort whatever to learn the terms of the lease, either from the plaintiffs or from Cartwright, on the contrary, they seemed desirous to keep their ignorance as to the terms of such lease intact. Under such circumstances, both by the knowledge that the plaintiffs were in possession under a lease, and the information from Stupplebeen, the Kahua Ranch Company were put upon their inquiry and should have sought for information from the parties in possession, there being no lease on record, as to their title; their ignorance, therefore, of the covenant of renewal was due to their own deliberate negligence and not to any concealment by the plaintiffs, and they may not "build an estoppel upon their own default.', (*Hill vs. Epley*, 31 Penn. 335.) "One is not relieved, who had the means of becoming acquainted with the extent of his rights." (*Ibid.* 334.) I think that this meets the whole argument upon the ground of estoppel. The silence of both Allen and S. Parker in regard to the covenant of renewal at the time the bid was made for a fifteen year lease, was due to forgetfulness, and the plaintiffs promptly informed the company of the fact of the covenant when they ascertained it, and before the company had become prejudiced by acting in ignorance of it. (1 Storey's Eq. Jur., Secs. 140-142, and *Kelly vs. Solari*, 9 M. & W. 53.) The case of *Galbraith vs Lunsford*, (27 Cen. L. J. 503,) which Mr. Smith, counsel for the Kahua Ranch Company, referred to upon the question of estoppel for acquiescence arising from ignorence of facts of which the parties might have informed themselves, shows a very long period of acquiescence amounting to inexcusable laches, extending over many years, during which the defendant's representative made expensive improvements. The circumstances of that case bear little analogy to the one before this Court and do not make it a precedent for it. No benefit by estoppel can be claimed in favor of the defendant, Cartwright, both for the reasons set forth above, and because there is no testimony adduced showing that he has acted under the lease to the Kahua Ranch Company in any way that would prejudice his *cestui que trust*, should the lease be cancelled.

Upon the fourth ground of defense, that the covenant for renewal not being recorded, and the Kahua Ranch Company being ignorant of its existence, they should not be affected by it, I am compelled to find under their admissions that they knew that the plaintiffs were in possession *under* a lease,—that they had sufficient notice to protect the previous lease. They were put upon their inquiry and might have ascertained the facts by going to the plaintiffs; they preferred to work in the dark and take their chances. (*Rives Adm. vs. Makalu*, 2 Haw. 166, *Davis vs. Spencer*, 3 Haw. 274, 283, and *Achi vs. Kauwa*, 5 Haw. 298.) "All the authorities agree that there is no difference in legal effect between actual and constructive notice." (*Hill as. Epley*, 31 Penn, St. 335.) "It is established law in Pennsylvania, that whatever puts a party on inquiry amounts to notice; provided the inquiry becomes a duty, as it always is with a purchaser; and would lead to the discovery of the requisite fact by the exercise of ordinary diligence and understanding." (*Ibid* 336.)

There is nothing unfair in the covenant for renewal; the fact that the land could now be leased at a much higher rent than was reserved by the lease to Allen and Stackpole, is not a ground which may influence a court of equity to disturb a *bona fide* contract.

The plaintiffs made a written demand upon Cartwright for a renewal of their lease several weeks before it expired, which seems to have been reasonable notice as to time. Under all the circumstances I think that they are entitled to such renewal and the Kahua Ranch Company, defendants, must hold their lease subject thereto.

Alfred S. Hartwell and Paul Neumann for plaintiffs; Cecil Brown for A. J. Cartwright, defendant; W. O. Smith for the Kahua Ranch Company, defendants.

Honolulu, February 11, 1889.

In the Supreme Court of the Hawaiian Islands—In Banco. Special Term, March, 1889.

S. KAILAA VS. S. M. KAAUKAI (K.), J. C. KAAUKAI (W.) AND MANA (K.).

BEFORE JUDD C.J., M'CULLY, PRESTON, BICKERTON AND DOLE, JJ.

Opinion of the Court by Bickerton, J. Dole, J., dissenting.

This is a bill in equity to declare a deed to be a mortgage. The matter comes here on appeal from the decision of Mr. Justice McCully, which is as follows:

DECREE.

This cause come on regularly to be heard on Thursday, the fourth day of January, A. D. 1885, Messrs. Charles Creighton and S. H. Kane appearing for the plaintiff, and Mr. J. M. Poepoe appearing for the defendants, and the respective parties being present in Court, and after reading the sworn bill of complaint herein and defendants' sworn answer thereto, the Court did order that no testimony be introduced, but that a decree be entered upon said bill and answer in favor of the said plaintiff; wherefore,

It is hereby ordered, adjudged and decreed that the deed executed on the eleventh day of May, A. D. 1885 (recorded in Liber 96, page 113, in the Registry of Deeds), by said plaintiff, S. Kailaa, to defendant, S. M. Kaaukai, husband of defendant J. C. Kaaukai, is a mortgage to secure the loan of the sum of $20 and interest loaned and advanced by defendant, J. C. Kaaukai, to plaintiff, and that this cause be referred to J. H. Reist, Master, to ascertain and report the amount of money, including the principal and interest due under the said mortgage. And that the report of the Master filed herein be confirmed, and said plaintiff is hereby decreed to pay to said Kaaukai the sum of $20 15-100 as said in report found to be due.

That Mana, one of the defendants herein, is hereby ordered and decreed to execute unto said plaintiff a good and sufficient deed of the property mentioned in said mortgage, and which was conveyed to said Mana by the defendants, J. C. Kaaukai and S. M. Kaaukai, and that said Mana's wife join with him in said conveyance and deed to plaintiff.

That the defendants, S. M. Kaaukai and J. C. Kaaukai, deliver up to plaintiff the said deed executed on May 11th, 1885, and said Mana deliver up to said plaintiff the deed from S. M. Kaaukai and J. C. Kaaukai to him dated June 13th, 1885, of record in Liber 98, page 128.

That the defendant S. M. Kaaukai do pay all the costs incurred in this cause, and also all cost of drawing, acknowledging and recording the deed from Mana to plaintiff.

February 18, 1889.

The plaintiff alleges in his bill that on or about 2d May, 1885, plaintiff went to one Meekapu, a tailor doing business in Honolulu, and ordered a coat, the price being $16. When the coat was finished plaintiff did not have the money to pay for it, but said he would in one week; but Meekapu refused to deliver the coat until the $16 was paid; that defendant Kaaukai was present and offered to loan the money to plaintiff if he would give security upon his land, which he (plaintiff) agreed to do; that a deed of the land was drawn up, the consideration named being $20; that said deed was absolute in form, but was intended merely to be a mortgage to secure the repayment of the said $20 so loaned by defendant; that deed was made to defendant, J. C. Kaaukai, wife of said S. M. Kaaukai, and was duly executed and acknowledged by the plaintiff.

That when the said deed was executed, defendant Kaaukai said to plaintiff that when said $20 was paid to him he would deliver up said deed, and reconvey the land to plaintiff. That shortly after the execution and delivery of said deed, plaintiff tendered to Kaaukai the said sum of $20, and requested him to return the deed and re-convey the said premises to him in accordance with the agreement between them. That Kaaukai refused to receive the $20, or to surrender the deed, or to reconvey the said land, or cause the same to be done, but told the plaintiff that he had no land, as he (Kaaukai) had sold the land to the defendant Mana, and given him a deed of it. That shortly after plaintiff went to defendant Mana and tendered him the said $20; but he, Mana, refused to receive the money or return the first-mentioned deed, or to reconvey the land to plaintiff. That the plaintiff is informed that Kaaukai held the said deed to Mana as security for the payment of a large part of the purchase money. That at time of purchase, and of execution of deed from Kaaukai to Mana, Mana had full knowledge of the fact that deed from plaintiff to Kaaukai was by way of mortgage, and that he had sufficient knowledge and information of the fact to put him on his inquiry. That the premises conveyed by plaintiff to Kaaukai are of the value of $800. And that said consideration of $20 is wholly inadequate for the said premises.

And plaintiff prays that the deed to Kaaukai be declared a mortgage for the security of the payment of the $20, and that the Court will ascertain and declare the sum due upon such security. That the said deed may be ordered to be delivered up and cancelled upon the payment of the money due thereunder. That the said deed to Mana may be delivered up and cancelled, and said Mana ordered to convey said land to plaintiff.

The answer of S. M. Kaaukai and J. C. Kaaukai, his wife, sets forth: That plaintiff asked him, Kaaukai, to give him money for the purpose of paying Meekapu for the coat; that they talked about plaintiff selling some cows and calves, also some land, and finally plaintiff offered to sell the land in question; that it is not true that he, Kaaukai, agreed to let plaintiff have the money he wanted by way of mortgage, but that the money was paid and given because plaintiff promised to sell the land; that a deed was made between the plaintiff and defendant for $20 in the shop of Meekapu, and there read to plaintiff and handed to him, and he (plaintiff) approved of said deed; that said deed was absolute in form, and was not intended as a mortgage to secure payment of $20; that the deed was duly executed and acknowledged; that he, Kaaukai, told plaintiff that if he was going to sell the land he would inform him, so he might have a chance to buy the land back again; and that before the deed to Mana was made, plaintiff was informed by defendant that he wanted to sell the land, and sent word to plaintiff to come and purchase said land if he wanted it, but that plaintiff did not come in time, and that J. C. Kaaukai and S. M. Kaaukai made a deed to defendant Mana; that after deed was made to Mana plaintiff did come to Kaaukai about the land, but did not offer him the $20, but merely said he was ready with $100, and if defendant S. M. Kaaukai would accept it he would buy the land back again. That it is true said land had been sold to Mana as stated in the complaint, and Kaaukai avers that he informed plaintiff that the land had been sold to Mana for $150, and that $100 had been paid; and that $50 was still due, and that he, Kaaukai, still held the deed of said land until balance was paid; and that he advised the plaintiff to go and see Mana, and if Mana was willing to accept the $100, then the land could be sold to him again.

The answer of Mana, one of the defendants, sets forth: That he did receive a deed from Kaaukai and wife for said land; that it is true that plaintiff came to him, but that he did not offer $20 as stated in complaint, but said he had heard from Kaaukai that the land had been sold to defendant (Mana), and so he had come to pay him $150 for the land. That Mana informed him he had paid $150 for it, that $100 had been paid, and that there was $50 still due, which was to be paid in February, 1886; and that if plaintiff paid him $100 and $2 for acknowledgements, and made arrangement with Kaaukai about the $50 still due, that he, Mana, would sell the land to plaintiff. That plaintiff said he would think over the matter; that from that time he has not seen the plaintiff. That said $50 has been paid to Kaaukai; that plaintiff has not paid defendant the $100; that he denies that Kaaukai had the deed to Mana as security for payment of part of the purchase price. That at time deed was made, and before that time, that he, Mana, did not know that the deed made by plaintiff to Kaukai was in the nature of a mortgage; and that he did not hear nor know of the arrangements made between plaintiff and Kaaukai as would put him on his guard, or cause him to search the title of defendants. That he acted in good faith, supposing from the deed that Kaaukai and wife had a good title. That he paid the $150 in three payments.

The deed from plaintiff to Kaaukai is dated 11th May, 1885, and recorded 15th of June, 1885. The deed from Kaaukai to Mana is dated 13th June, 1885, and recorded 27th February, 1886.

We do not find any denial in the answer that the land is of the value of $800. This allegation we must presume to be true. It certainly does seem a most extraordinary thing for a man to be willing to sell for $20 what was worth $800, simply to get $16 to pay for a coat! Twenty dollars was certainly not anything near the value of land, for we find that a few weeks after Kaaukai sold the same to Mana for $150.

Story, in his Equity Jurisprudence, Section 246, says:

"There may be such an unconscionableness or inadequacy in a bargain as to demonstrate some gross imposition, or some undue influence, and, in such cases, Courts of Equity ought to interfere upon the satisfactory ground of fraud. But then such unconscionableness or such inadequacy should be made out as would (to use an expressive phrase) shock the conscience, and amount in itself to conclusive and decisive evidence of fraud."

This gross inadequacy in itself should have put Mana on his inquiry, as the deed to Kaaukai was of record. But we find from the answer, that a short time after the first deed and and when Mana had only paid $100 of the purchase price, still owing $50, and when the deed from Kaaukai to to Mana was still, as is admitted by Mana, in the possession of Kaaukai, and had not been delivered to Mana, plaintiff had a conversation with him, Mana, in regard to the land. He then had full notice of the transaction before his own purchase was complete, and cannot now claim that he was an innocent purchaser without notice. It is noticeable that the deed to Mana is dated 13th June, 1885, and not recorded until 27th February, 1886. This tends to show that Mana did not get delivery of the deed until about that date, viz: 27th February, 1886. This is a suspicious circumstance, for he had been informed some time before, in June, 1885, by plaintiff, that there was trouble about the land, and he would probably have placed the deed on record at once if he had it in his possession. Mana, in his answer, says there were three payments.

There are a great many very suspicious elements about this whole case, and they strongly indicate fraud on the part of Kaaukai.

We are of opinion that the learned Justice was fully warranted in ordering the decree he has, on the bill and answer. And the decree is sustained.

Appeal dismissed with costs.

C. Creighton and Kane for plaintiff; J. M. Poepoe for defendants.

Honolulu, April 30, 1889.

Dissenting Opinion by Mr. Justice Dole.

I doubt the correctness of the decree appealed from, with regard to the defendant, Mana. No evidence was taken and the inference from the bill and answer that the deed from the Kaaukais had not been delivered to Mana when the plaintiff, Kailaa, first applied to him for the return of the land, appears to me to be based upon insufficient foundation. The bill in section 10, alleges that the defendant, S. M. Kaaukai told the plaintiff that he "had sold the land to Mana, defendant herein, and given him, said Mana, defendant, a deed of said premises." Mana, in the answer alleges, "It is true, as stated in the 10th section of the bill, that he did receive a deed from S. M. Kaaukai and J. C. Kaaukai, two of the defendants, for the land in question." These statements clearly to a period previous to the first application by the plaintiff to Mana to return the land. If it was a fact that the deed was delivered to Mana at that time, the title passed thereby, and he was an innocent purchaser, so far as is shown, unless the inadequate price mentioned in the deed from Kailaa should have put him on his inquiry. There is nothing in the record to oppose this theory but S. M. Kaaukai's allegation in the answer, that when the plaintiff applied to him to have the land returned to him, he "informed plaintiff that the land had been sold to Mana for $150, and that $100 had been paid and that $50 was still due and that he then held the deeds of the land for the balance," which would be consistent with the theory that the deed was delivered to Mana, and thereafter was deposited by him with S. M. Kaaukai as security for the balance of the price of the land.

Even if it is true, as it may be, that the deed was not delivered by S. M. Kaaukai to Mana at first, but was held back until the balance was paid, it was finally delivered in February, 1886, and recorded; under these circumstances the conclusion of the Judge at Chambers, that Mana had been put on his inquiry before such delivery, is a matter of inference from what appears to me to be very meagre data. The following is all the record has to offer on this point. Section 11th of the bill: "That shortly thereafter your orator went to said defendant, Mana, and tendered him the said $20.00, but said Mana refused to receive said money or to return said first mentioned deed to your orator, or to reconvey the said premises to your orator." Section 2d of Mana's answer: "It is true that the plaintiff did come to this defendant, as is stated in the 11th section of the bill, but that he did not offer this defendant $20.00 as stated in said 11th section, but he said he had heard from S. M. Kaaukai, one of the defendants, that the land had been sold to this defendant and so he had come to pay this defendant $100 for said land." There is certainly nothing here to have awakened suspicion in Mana's mind that there was anything wrong in the transaction between Kailaa and S. M. Kaaukai or to put him on his inquiry.

Nor does it seem to me that the inadequate price of $20.00 named in the deed from Kailaa, necessarily put Mana on his inquiry. A price named in a deed is only *prima facie* evidence of the real consideration. Moreover Mana in his answer, denies all knowledge of the private arrangements between Kailaa and S. M. Kaaukai, such as would put him on his guard in the matter, or inform him that a mortgage was intended by the deed from Kailaa.

The price of the land as conveyed to Mana is a better indication of its real value than the allegation of the bill of complaint and considerably reduces the disproportion of the prices named in the two deeds.

It may be that there was evidence that would make Mana liable in the matter, but the record, as it stands, does not implicate him, to my mind, but leaves him in a position of an innocent third party who is entitled to protection as such.